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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~942~~ 65

KEVIN L. DONALDSON,
f/k/a MERTON H. SWEET,

Petitioner,

versus

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Respondents,

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Kevin L. Donaldson, your petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case entered on October 30, 1969.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals, reprinted in Appendix A hereto, is unofficially reported at — F. 2d — (69-2 USTC 9701).

JURISDICTION

The judgment of the Court of Appeals, reprinted in Appendix B hereto, was entered on October 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether the taxpayer under investigation has a right to intervene in proceedings seeking judicial enforcement of Internal Revenue Summonses issued to third parties.

II.

Whether an intervening taxpayer is entitled to a full adversary hearing in challenging enforcement of administrative Summonses issued by the Internal Revenue Service.

THE STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of Section 7602 and Section 7604(a) of the Internal Revenue Code of 1954, which provisions are set forth in Appendix C hereto.

STATEMENT OF THE CASE

Petitioner, receiving notice that the Internal Revenue Service contemplated issuing Summonses to Joseph J. Mercurio and Acme Circus Operating Company, Inc.,[1] moved for and was granted a Preliminary Injunction

[1]The Court of Appeals designated these parties as "two former employers of the taxpayer." (Appendix A, *infra*, p. 12), a determination which finds no support in the record.

and Temporary Restraining Order.[2] (R. 26, 64).[3] Pursuant to the Preliminary Injunction and Temporary Restraining Order, Mercurio and Acme refrained from complying with the Summonses subsequently issued by the Internal Revenue Service. (R. 14, 52). The underlying actions were instituted by the Government, in the District Court, pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. (R. 4, 42). The Summonses in question required Mercurio and Acme to appear and give testimony concerning the alleged income tax liability of your petitioner for the years 1964 through 1967, inclusive, and to produce for inspection the books and records of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus. (R. 9, 47).

On December 6, 1968, your petitioner filed Motions to Intervene and Answers in each of the enforcement proceedings setting forth good faith affirmative defenses. (R. 16, 54). The United States filed a Motion in Opposition to Intervention. (R. 30, 66).

The District Court denied your petitioner's Motions to Intervene and ordered enforcement of the Summonses, upon consideration of the pleadings, Memoranda of the parties, and argument of counsel, but without benefit of any testimony. (R. 32, 33, 68).

The Court of Appeals affirmed the District Court Order. The Fifth Circuit held the right to intervene had not been established, concluding your petitioner alleged

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[2]The procedure approved by this Court in *Reisman v. Caplin,* 375 U.S. 440, 449, 450 (1964).

[3]"R" references are to the printed Appendix in the United States Court of Appeals.

no interest which warranted the trial Court's refusal to enforce the Summonses. (Appendix A, *infra,* pp. 15, 21). The Opinion seemingly holds that intervention under *Reisman v. Caplin,* 375 U.S. 440 (1964), is limited to factual situations unlike the case at bar, where a taxpayer alleges a legal or equitable claim to the records sought, a proprietary interest, or privileged relationship. (Appendix A, *infra,* p. 13).

A timely Application for Stay of Mandate was filed by your petitioner pending his Petition for Certiorari. On November 18, 1969, the United States Court of Appeals for the Fifth Circuit granted a Stay of Mandate.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Fifth Circuit is in Direct Conflict With Decisions of the Courts of Appeal for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969), for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969), and for the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966), and is Inconsistent With This Court's Decision in *Reisman v. Caplin,* 375 U.S. 440 (1964).

This Court, in *Reisman v. Caplin,* 375 U.S. 440 (1964), determined the rights of Internal Revenue Service Agents to enforce administrative Summonses issued under Section 7602 of the Internal Revenue Code of 1954, and the concomitant rights of witnesses, third parties, taxpayers, and other parties affected. Prior judicial decisions in various circuits had limited the types of objections that could be asserted by third parties summoned or inter-

vening taxpayers.[4] The *Reisman* decision eliminated these distinctions by expressly providing that:

> both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. *Reisman v. Caplin,* 375 U.S. 440, 445 (1964).

The Fifth Circuit would limit intervention under *Reisman* to proceedings seeking production of documents belonging to a taxpayer, the work product of his attorney, or documents in which the taxpayer claimed some proprietary interest, or evidentiary claim of privilege. (Appendix A, *infra,* pp. 13, 21. Concluding that petitioner had not alleged a requisite interest, the Fifth Circuit affirmed the Order of the District Court.

A taxpayer has the right to intervene in a judicial proceeding wherein the Internal Revenue Service seeks to enforce its Summons issued in connection with the taxpayer's alleged tax liability.

The preceding proposition is unequivocally supported by the decisions of the Courts of Appeal for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969); the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966); and the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969). In *Benford,* the District Court denied intervention holding that this Court's decisions in *Reisman v. Caplin,* 375 U.S. 440 (1964), and *United States v. Powell,* 379 U.S. 48 (1964), did not alleviate the necessity to show a proprietary or other special in-

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[4] *Foster v. United States,* 265 F. 2d 183 (C.A. 2, 1959), cert. den. 360 U.S. 912 (1959); *Hubner v. Tucker,* 245 F. 2d 35 (C.A. 9, 1957); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *Application of Magnus,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 375 U.S. 902 (1963).

terest in the records subject of a summons, and that being the taxpayer whose liability is under scrutiny is not alone sufficient a basis for intervention.

The Court of Appeals in *United States v. Benford,* 406 F. 2d 1191, 1193, 1194 (C.A. 7, 1969), responded by stating:

> If the import of *Reisman* and *Powell* were closely confined to their facts, we could well agree with the district court.
>
> * * * * * * *
>
> But the opinions did not qualify the broad statements that "both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims"; that "In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene"; * * * The opinions did not expressly, and, as we read them, did not impliedly, limit the taxpayer's right to intervene in enforcement proceedings to situations where a legally protected interest in the records could be shown.

United States v. Bank of Commerce, 405 F. 2d 931 (C.A. 3, 1969); and *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966), involved the enforcement of summonses issued to banks concerning the taxpayer's transactions. The taxpayers in *Bank of Commerce* and *Justice* had no greater interest in the documents demanded than your petitioner has in the records sought herein. Nevertheless, the Courts allowed intervention by those taxpayers. Cf. *Application of Cole,* 342 F. 2d 5, 7-8 (C.A. 2, 1965), cert. den. 381 U.S. 950 (1964), where the *sole* question presented was whether the Internal Revenue Service, when it issues a summons to a third person under Section 7602, is required to give the taxpayer notice thereof.

Discussing a taxpayer's intervention in summons enforcement proceedings, the Court of Appeals in *Justice v. United States,* 365 F. 2d 312, 314 (C.A. 6, 1966), adopted the guidelines established by this Court in *Reisman* and further commented:

> Upon consideration of the motion of the taxpayers to intervene, the Court finds that these proceedings under Section 7604(b) are properly before the Court. The questions raised as to the Taxpayers' constitutional rights and their rights and privileges under the various revenue statutes must be heard and determined by the District Court under the Federal Rules of Civil Procedure. See Rules 24 and 81(a)(3).
>
> The Court finds it is probable that the representation of the Taxpayers' interest by existing parties may be inadequate and that the Taxpayers may be bound by a judgment in the action. This Court is of the opinion that unless the Taxpayers are permitted to intervene, they would not be aggrieved parties, entitling them to an appeal.

The Court in *United States v. Bank of Commerce,* 405 F. 2d 931, 933 (C.A. 3, 1969), concluded:

> At the outset, we are confronted by the appellee's contention that the appellant lacks standing to raise the objections which he asserts. We do not agree. The rule approved by the Supreme Court in *Reisman v. Caplin,* 375 U.S. 440 (1964), is that a taxpayer may intervene in an enforcement proceeding and challenge enforcement of the summons by raising constitutional or other objections in protection of his rights and interests. Here, *appellant's defenses, as he styles them, are aimed solely at protecting his individual rights and interests. Appellant makes no claim on behalf of the bank, either derivatively or in a representative capacity.* [Emphasis added]

It is submitted that no material distinction exists between the facts in this case and those present in *Benford, Justice,* and *Bank of Commerce.* (R. 22, 27, 60). Accordingly, the Fifth Circuit's decision is in conflict with the decisions of the aforestated Courts of Appeal, and this Court's mandate in *Reisman v. Caplin,* 375 U.S. 440 (1964), and unless reversed stands to cause an anomalous result.

II.

The Decision of the Fifth Circuit so Far Departs from the Judicial Procedure Established by This Court in *Reisman v. Caplin,* 375 U.S. 440 (1964), and *United States v. Powell,* 379 U.S. 48 (1964), as to Call for an Exercise of This Court's Power of Supervision.

United States v. Powell, 379 U.S. 48 (1964), which also involved the enforcement of Internal Revenue Summonses brought by the Government pursuant to Section 7604(b) of the Internal Revenue Code of 1954, established standards the Commissioner of Internal Revenue must meet to obtain judicial enforcement of administrative Summonses:

> He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed — * * * This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing, he "may challenge the summons on any appropriate grounds," *Reisman v. Caplin,* 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no

> circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.
>
> *United States v. Powell,* 379 U.S. 48, 58 (1964).

The Fifth Circuit in not allowing intervention denied petitioner an adversary hearing, a right it subsequently recognized in *United States v. Roundtree,* — F. 2d — (C.A. 5, Nov. 20, 1969), 69-2 USTC 9733:

> A proceeding to enforce a summons is an adversary proceeding. *Reisman v. Caplin,* 1964, [64-1 USTC ¶ 9202] 375 U.S. 440, 446, 84 S. Ct. 508, 11 L. Ed. 2d 459; *Dunn v. Ross,* 5 Cir. 1966, [66-1 USTC ¶ 9238] 356 F. 2d 664, 667. In the absence of other statutory directions, the Federal Rules of Civil Procedure apply. Fed. R. Civ. P. 81(a)(3); *Powell,* 379 U.S. at 58 n. 18; *United States v. McKay,* 5 Cir. 1967, [67-1 USTC ¶ 12,449] 372 F. 2d 174. We have construed the thrust of this determination to be that "the parties must be given a full opportunity in an adversary hearing to present their case". *Venn,* 400 F. 2d 212 n. 12.
>
> *United States v. Roundtree,* at page, 86,068.

The District Court below has taken no testimony and has not permitted petitioner to submit evidence nor cross-examine Government witnesses in an effort to attack its pleadings and affidavits. Under these circumstances, petitioner has not been afforded the adversary proceeding prescribed by this Court in *Reisman* and *Powell,* nor by the Fifth Circuit:

> . . . [I]t hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all. *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 827 (C.A. 5, 1967).

The parties against whom the United States have commenced the underlying actions were restrained from complying with the subject summonses until such time as an order of a court of competent jurisdiction was issued requiring such compliance. (R. 27, 64). The full judicial review inherent in such order contemplates a hearing which will exhaust all issues submitted to the court or which are properly the subject of submission to the court. This necessitates the involvement of all real parties in interest which will thereafter be governed by a determination. A premature determination of the merits, sanction by the Fifth Circuit, so far departs from recognized judicial procedures, as to require the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 9, 1969.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27341

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME
CIRCUS OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

(October 30, 1969)

Before TUTTLE, WISDOM and BELL, Circuit Judges.

TUTTLE, Circuit Judge: We have here for consideration against phase of the problem arising when a United States District Court is asked by an Internal Revenue special agent to enforce a subpoena requiring the production of records affecting a taxpayer.

The enforcement procedures were commenced under the authorization of Title 26, U.S.C.A., §§7602 and 7604.[1]

The issue was raised in the following manner: (There are actually two cases involved here). On November 25, 1968, petitioners, United States of America and John P. Grady filed a petition to enforce Internal Revenue Service summons against respondent, Joseph J. Mercurio, and against Acme Circus Operating Company, Inc., two former employers of the taxpayer, Kevin L. Donaldson, formerly known as Merton H. Sweet, the taxpayer and the appellant here. Following the issuing by the trial court of its order to show cause, on December 9, 1968, intervenor Donaldson filed his motion to intervene as a respondent and to file an answer. On December 13, respondents filed their answers in which they stated that

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[1]"§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Section 7604 confers jurisdiction on the district court to require a response upon proper showing of such subpoena.

they were prepared to answer the subpoenas but for the granting of a temporary restraining order which had previously been issued by the trial court "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance." On January 10, 1969, petitioners, United States of America and Grady, filed their opposition to the motion to intervene. On that date, a hearing was had on Donaldson's motion to intervene as respondent. Memoranda of law were filed in support of and in opposition to the motion and the matter was continued until January 16, 1969. On that date the court entered its order denying Donaldson's motion to intervene, and entered its order directing respondent's to comply with the Internal Revenue summons. This order was later stayed pending appeal. Notice of appeal was filed on the same day and the matter is here now for our consideration.

It may clarify the discussion here to begin by stating what is *not* involved. We do *not* have a case in which a subpoena has been issued at the instance of a special agent of the Internal Revenue Service against a *taxpayer* himself, seeking access to *his* records and papers and the right to take his testimony, such as was the case in *United States v. Cohen,* 9 Cir., 1967, 388 F. 2d 464; nor is it a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant, which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin,* 375 U.S. 440, and this court's recent decision in *Stuart v. United States, et al,* 5 Cir., decided September 17, 1969, —F. 2d—; nor is it a case in which records actually belonging to the *taxpayer* are subpoenaed while in possession of some third person, but where no privilege exists.

To the contrary, what we have here is a subpoena served on two former employers of the taxpayer demanding the production of *their* own records, not the records of the *taxpayer*.

It would seem, upon the most casual observance of this situation, that if the United States were seeking to obtain these records in support of an actual prosecution, following indictment, appellant would have no basis for seeking to have the indictment quashed on the ground of a violation either of Fourth or Fifth Amendment rights, since there would have been no unreasonable search or seizure nor any compulsion of the taxpayer's giving evidence against himself. The issue that is here presented, therefore, depends solely upon the appellant's argument that the court's power to require a response to the subpoena must depend upon the validity of the original subpoena itself; that the Internal Revenue Code authorization for the issuing of a subpoena is restricted to the obtaining of records and testimony where no criminal prosecution is in prospect or in contemplation. By alleging, in its petition to intervene, that the subpoena was not truly issued for one of the purposes authorized under Section 7602, appellant claims he was entitled to intervene to raise this issue, since the employers were not concerned about protecting any rights of appellant.

To sustain his right to intervene, the appellant, in his brief, cites Rule 24(a) of the Federal Rules of Civil Procedure.[2] However, oral argument, appellant relied

[2] "(Rule 24(a): Intervention: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

for his right to interene solely on *Reisman v. Caplin,* supra. He claims tha he should be given the relief of intervention as a maer of right. In order to test this question, since the tal court did not conduct an evidentiary hearing, we ıust look to the pleading by which appellant sought to iervene. Once again, it is necessary to point out what thepetition does *not* contend: (1) It does not contend tha the papers sought to be obtained from the former empyer were *his* papers; (2) he does not contend any condential relationship which under the rules of privilegevould entitle him to prevent a disclosure by his formermployer of any facts that might be relevant to the inquir being made. In effect, the petition alleges that he has anterest in the subject matter of the investigation, which,f course, he has, that is, whether or not there has been aleficiency in the tax returns or tax payments made by te taxpayer and/or whether or not such deficiency is ofuch a nature as to warrant recommendation of prosetion for a crime against the revenues. However, it do *not* allege any fact which, if found in his favor, would rrant the trial court's quashing the subpoena against thehird party.

The petition of tl United States and John P. Grady was supported by anffidavit by special agents Miller and Grady as follows:

> "In his capacy as special agent, he is assisting in the conduct of a investigation for the purpose of ascertaining the crect income tax liability of Merton H. Sweet, alsonown as Kevin L. Donaldson, for the years 1964 rough 1967 inclusive."

In his motion to intvene, appellant alleges:

> "Petitioner ›hn P. Grady, special agent, and Bruce B. Mill(special agent, New Orleans, Louis-

iana, are guilty of bad faith both with the court and the intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson, for the calendar years 1964, 1965, 1966 and 1967.

"John P. Grady is a special agent assigned to the intelligence division, Internal Revenue Service, Tampa Florida, and Bruce B. Miller is a special agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

"The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

"Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and special agent John P. Grady is assisting special agent Miller in this investigation."

These, then, are the allegations of the complaint upon which the appellant bases his contention that the issuance of a subpoena in support of such an investigation is beyond the authority contained in Section 7604. In making this contention, appellant relies heavily upon language of the Supreme Court in *Reisman v. Caplin,* supra. The particular language relied upon is as follows:

"Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the

summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cir., 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege, Sail v. U. S., 8 Cir., 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See in Re: Albert Lindley Lee Memorial Hospital, supra, and Corbin Deposit Bank of Corbin, Ky. v. U. S. supra. . . ."

Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed, no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *"this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,"* citing *Boren v. Tucker,* supra.

This argument goes too far. In the first place, it will be noted that under the express language of the Act, the subpoena may be served upon the taxpayer himself or upon any other person having records relevant to the inquiry. It is also apparent that *there is no express limitation on the face of the statute* that the power to make the investigation to — ascertain "the correctness of any return, making a return where none has been made, determining the liability for any person for any internal revenue tax" limits the inquiry to such as will result *solely* in a proposed deficiency in tax or deficiency plus civil fraud penalties. Nor is there any limitation expressed on

the face of the act that the inquiry may not be made if "determining the liability of any person for any internal revenue tax" or "ascertaining the correctness of [a] return" is made to assist the internal revenue service agents in determining *whether there is sufficient evidence that a crime against the revenues has been committed to warrant a recommendation* to the Justice Department that the case be marked for prosecution.

The investigation made by a special agent of the Internal Revenue Service, of which by this time the courts may take judicial notice, see footnote 3 in *Wild v. United States,* 9 Cir., 362 F. 2d 206, at page 208,[3] includes the duty of "developing information concerning alleged criminal violations, evaluating allegations and indications of such violations to determining investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes." Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis

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[3]This footnote is as follows:

"30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988, which provides:

"1118.6 INTELLIGENCE DIVISION.

"The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir., 239 F. 2d 767. In the *Boren* case, the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. Pointing out the difference between the *O'Connor* case and that pending before it, the Court of Appeals for the Ninth Circuit, in *Boren,* said:

> "It should be noted that the statute under consideration, by its language, does not limit the examination it authorizes solely to the issue of correctness. Section 76-02 authorizes an examination for the purpose of 'ascertaining the correctness,' 'determining the liability of any person for any internal revenue tax,' 'or collecting any such liability.' If a fraudulent tax return changes a taxpayer's liability, how could that fact be established without someone being required to come to a conclusion as to a possible criminal prosecution? Once an error has been established, it seems necessary for the examiner to come to some conclusion, one way or the other, as to whether there existed the possibility of criminal prosecution in the future. If no possibility exists, then one rule to determine liability comes into play — i.e., what tax should have been paid when the tax is correctly determined. If a possible criminal prosecution exists, then there is a possibility of another rule being used, the 50% penalty, to determine the correct tax. While it is true that once a possible criminal prosecution comes into existence

there can be no settlement of tax until that possibility has been ruled out, yet the existence of the possibility of criminal prosecution does not necessarily mean that there will be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecution. Helvering v. Mitchell, supra; 26 U.S. C.A. §6653(b), 7201 et seq.

"In truth, we presume the 'Secretary or his delegate' would be unfaithful to his statutory responsibilities if in every examination, once an incorrect return has been demonstrated or established, he did not come to some preliminary conclusion as to whether there existed facts sufficient upon which to base a possible criminal prosecution, without coming to any conclusion as to whether there should be a criminal prosecution."

This court has recognized the same principle as stated in *Boren* in *Venn v. United States,* 5 Cir., 1968, 400 F. 2d at 210.

As we construe the motion to intervene, it simply says that since the subpoena has been issued by a special agent whose duty it is to aid in developing information relative to a possible prosecution this would amount to an "improper purpose of obtaining evidence for use in a criminal prosecution," within the language of the Supreme Court in *Reisman.*

In view of the fact that there is no allegation in the complaint that even the special agent had recommended a prosecution, much less that the Internal Revenue Service had sent the case to the Department of Justice for the purpose of presentation to a grand jury, the investigation being made by the special agents would still, in our view, come within the authority granted within 7602, as de-

scribed in the *Boren* opinion. A case which strongly supports this view is *In Re-Magnus, Mabee, Reynard, Inc.*, 2 Cir., 1962, 311 F. 2d 12.

We think it essential to bear in mind what seems to be so often unspoken in discussion of the power given under 7602 and 7604(b). Before indictment but after a potential criminal investigation commences, the courts have been somewhat troubled by the question of how much interrogation of the *taxpayer* is *constitutionally* permissible. Of course, after indictment, no subpoena can run against the accused.

There is no *constitutional* question as to the power of the Service to question, or subpoena records of *third parties* either before or *after* indictment. In cases in which the courts inveigh against the use of 7602 by a special agent, broad language is sometimes used to limit the authority because this effort has usually been made to obtain evidence from the taxpayer. The language is not apt and, is not controlling, if the subpoena power is being used to compel evidence by *third parties*. We have merely a problem of statutory construction of Section 7602.

There being no right which the appellant asserts that he could present to warrant the trial court's refusal to enforce the subpoena, the right to intervene has not been established. The language in *Reisman* "in addition, third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he too may intervene" is, of course, limited to the right to intervene if the person seeking the right can demonstrate to the court that he has interests to protect. Here, Donaldson's petition has alleged no such interest.

The trial court correctly denied the motion to intervene. The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27341

D. C. Docket No. Civ. 68-490 & 68-491-T

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME
CIRCUS OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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Before TUTTLE, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that intervenor-appellant pay to petitioners-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 30, 1969

Issued as Mandate:

APPENDIX C

SECTION 7602 OF THE INTERNAL REVENUE CODE:

SECTION 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SECTION 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.